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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSE ANTONIO RUIZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a post-flight seizure and subsequent warrantless X-ray of checked, personal luggage violate the owner's Fourth Amendment rights where seizing and searching officers do not have probable cause to believe the luggage contains evidence of a crime?

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No. _____

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The Petitioner, JOSE ANTONIO RUIZ, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is not reported but is reproduced at App. A-1.

JURISDICTION

The opinion of the Court of Appeals was filed January 3, 1984, and a Petition for Rehearing was denied February 13, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be searched.

STATEMENT OF THE CASE

On October 27, 1982, a Federal Grand Jury sitting in the Southern District of Florida returned a two-count Indictment charging the Petitioner with violation of Title 26, U.S.C., Sections 5861(d) and 5871; in violation of Title 18, U.S.C., Section 922(e) and Section 924(a); and Title 18, U.S.C., Section 2, respectively. On March 2, 1983, a Federal Grand Jury, sitting in the Southern District of Florida returned a superseding Indictment adding to the original Indictment the charge of knowingly and intentionally possessing cocaine in violation of Title 21, U.S.C., Section 844.

A Motion to Suppress Tangible Evidence was filed by the Petitioner alleging that the firearm and cocaine found in the Petitioner's checked and locked luggage was the result of an unlawful post-flight search and seizure. The Trial Court denied the Motion.

On March 26, 1983, a non-jury trial was held, and the Petitioner was found guilty by

the Court on all three counts. On June 10, 1983, the Petitioner was sentenced to five years on Count I, ten years on Count II, and one year on Count III. The sentence on Count III was to run concurrent with that of Count II, consecutively to Count I. The Court suspended sentence as to Counts II and III and placed the Petitioner on five years probation, to begin upon discharge from incarceration.

The Eleventh Circuit Court of Appeals affirmed the Petitioner's convictions. In essence, the Eleventh Circuit affirmed the Trial Court' s denial of the Petitioner's Motion to Suppress Evidence finding that the actions of the police officers were "reasonable under all of the circumstances" and that Petitioner was not deprived on any rights he had under the Fourth Amendment to the Constitution.

STATEMENT OF THE FACTS

1. The Facts

On January 26, 1982, at Fort Lauderdale Airport, the Petitioner, purchased two previously reserved airline tickets in the name of Mr. and Mrs. Prieto on Eastern Airlines Flight No. 756 from Fort Lauderdale to La Guardia Airport in New York City. When the Petitioner passed through the metal detector at the Eastern Concourse, a weapon was observed on the X-ray machine in his carry-on luggage. The Petitioner was subsequently arrested and charged with a misdemeanor. After explaining that his mother had packed the bag the night before, the Petitioner was given a summons to appear in Court and was released.

The Petitioner was traveling with a female companion, Judith Wyatt. During the time the Petitioner was initially in custody, and approximately thirty minutes following his first arrest, he gave the airline tickets he possessed to Ms. Wyatt so that they could be

exchanged, and she could arrange for re-booking on the next available flight to New York.

Shortly after Wyatt was to exchange the airline tickets, she encountered Roger Lekutis of the Broward Sheriff's Office. Wyatt, at that time, advised Lekutis that the airlines would not exchange the tickets because the tickets were in the names of Mr. and Mrs. Prieto. When the Petitioner rejoined Ms. Wyatt, Officer Lekutis re-arrested the Petitioner for the felony offense of carrying a concealed firearm. (This arrest also related to the firearm originally found in the carry-on baggage.) The airline tickets were then seized. The tickets revealed a claim check indicating that the Petitioner had previously checked a piece of luggage on the original Eastern Airlines flight. After making this determination, Deputy DiPaola of the Broward Sheriff's Office called Eastern Airlines Agent Piverotto at La Guardia Airport, advised him of the claim check number on the suitcase, and requested him to

seize the Petitioner's luggage and search it for "precautionary measures".

Agent Piverotto located the suitcase in New York at La Guardia Airport. He attempted to pry it open but determined that it was locked. He therefore took the suitcase and placed it under an X-ray machine and saw what appeared to be a firearm resembling a machine gun. The suitcase was not opened at that point. Instead, the suitcase was put back on an airplane and returned to Fort Lauderdale. When it arrived, Agents of the Broward Sheriff's Office again put it under an X-ray machine.

Detective Thomas Brennan, after receiving information about the Petitioner and his suitcase, submitted to Magistrate Kyle an affidavit in support of a search warrant for the retrieved suitcase. Finding probable cause, the Magistrate issued the search warrant, and the suitcase was opened. Inside the suitcase was found a machine gun and cocaine. It is this evidence that lead to the instant Indictment and that is the subject of this Petition.

2. The District Court's Ruling

At the Motion to Suppress Evidence, the District Court found that the Eastern baggage agent was called at La Guardia Airport by the officers in Fort Lauderdale and told to seize and search the Petitioner's baggage. After the agent was unable to open it, he subsequently placed the baggage under an X-ray machine and saw something that appeared to be a machine gun or an automatic-type weapon.

The District Court also found that the Petitioner had intended to go on to New York and therefore had not abandoned his property. However, the District Court found that the officers had articulable, reasonable suspicion to stop and frisk the bag in New York.

The District Court also determined that as a matter of law, the X-ray was a search but that it was as inobstrusive as a stop and frisk, and therefore found the search not unreasonable under the circumstances.

3. The Court of Appeal's Opinion

A panel of the United States Court of Appeals for the Eleventh Circuit affirmed. (App. A-1). The majority stated that it must determine whether the Trial Court committed clear error in applying the law relating to search and seizure. The majority then concluded that the District Court properly denied Appellant's Motion to Suppress Evidence, and in so doing, the majority found that the actions of the agents and officers were reasonable under the holdings of Terry vs. Ohio, 392 U.S. 1 (1968); and United States vs. Place, __ U.S. __ (1983).

A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed. No judge requested a poll of the Circuit Judges concerning En Banc rehearing. The Petition was denied without a statement of reasons. (App. A-6).

REASONS FOR GRANTING THE WRIT

This case presents a substantial constitutional question regarding search and seizure law. This Court has consistently held that probable cause and exigent circumstances to the warrant requirement must exist to justify a warrantless search and seizure of a persons personal property, the test used by the Court below, "reasonableness under the circumstances"is not the appropriate standard.

The decision below ignores both the probable cause and exigent circumstances requirement to search and seize and therefore conflicts with this Court's decisions in United States vs. Place, __ U.S. __, 103 S.Ct. 2637 (1983); and Terry vs. Ohio, 392 U.S. 1 (1968). As a consequence, the Petitioner has been denied his rights to be free from unlawful searches and seizures as guaranteed by the Fourth Amendment. Certiorari should be granted for this reason.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE PETITIONER WAS DENIED HIS FOURTH AMENDMENT RIGHTS WHERE OFFICERS SEIZED AND X-RAY SEARCHED HIS CHECKED LUGGAGE, POST-FLIGHT, WITHOUT PROBABLE CAUSE TO BELIEVE THE LUGGAGE CONTAINED CONTRABAND.

In affirming the District Court's Order denying the Petitioner's Motion to Suppress Evidence, the Court of Appeals held that the actions of the officers, in seizing the Petitioner's checked luggage, post-flight, and submitting it to an X-ray search, was reasonable under the circumstances. (See App. A-4). In so holding, the Court of Appeals relied on United States vs. Place, __ U.S. __, 103 S.Ct. 2637 (1983); and Terry vs. Ohio, 392 U.S. 1 (1968).

In Place, this Court held that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer

to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. 103 S.Ct. at 2644. In the case sub judice, the Petitioner's luggage was seized to search it. The seizure was not limited in scope. Because the seizing officer could not pry it open, he exposed it to an X-ray scanner. This investigative procedure must be described as nothing other than a seizure and search requiring probable cause, not reasonable suspicion to believe that a crime has been committed, Terry vs. Ohio, 392 U.S. 1 (1968).

Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime but have not secured a warrant, the Court has interpreted the Amendment to permit the seizure of property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other

recognized exception to the warrant requirement is present. Id. (Citing Arkansas vs. Sanders, 442 U.S. 753, 761 (1979); United States vs. Chadwick, 433 U.S. 1 (1977); Coolidge vs. New Hamshire, 403 U.S. 443 (1971). The District Court determined that there existed no probable cause and exigent circumstances to justify the search of the luggage after it had flown from Fort Lauderdale International Airport to LaGuardia Airport in New York City. The initial seizure of Petitioner's luggage for the purpose of searching it (either by opening it or subjecting it to an X-ray which the District Court held to be a search in accordance with United States vs. Henry, 615 F.2d 1223 (9th Cir. 1980); and United States vs. Haynie, 637 F.2d 227 (4th Cir. 1980), should necessarily have been accompanied by a warrant. United States vs. Place, 103 S.Ct. at 2641 (citing e.g., Marron vs. United States, 275 U.S. 192 (1927).

In the ordinary case, this Court has viewed a seizure of personal property as "per se" unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant, particularly describing the items to be seized. United States vs. Place, 103 S.Ct. at 2641. In Place, this Court found that a warrantless seizure of personal luggage on the basis of reasonable, articulable suspicion, premised on objective facts that the luggage contained contraband or evidence of a crime was appropriate. United States vs. Place, 103 S.Ct. at 2642. However, this Court warned that the "intrusion" must be limited in scope, citing this Court's decision in Terry. Id. at 2642. Clearly, the seizure by the agent at LaGuardia Airport was not a limited one. The agent, without probable cause to believe it contained evidence of a crime, seized the luggage and attempted to pry it open but could not. He

immediately thereafter removed the luggage to an X-ray scanner where it was searched.

In Place, Respondent's luggage was seized to arrange its exposure to a narcotics detection dog. This Court held that such exposure was not a search within the meaning of the Fourth Amendment. United States vs. Place, 103 S.Ct. at 2644-45. The Court noted however that if the investigative procedure was itself a search requiring probable cause, the initial seizure of luggage for the purpose of subjecting it to the sniff test--no matter how brief--could not have been justified on less than probable cause. United States vs. Place, 103 S.Ct. at 2644, citing Terry vs. Ohio, 392 U.S. at 20; United States vs. Cortez, 449 U.S. 411, 421 (1981); United States vs. Brignoni-Ponce, 422 U.S. 873, 881-882 (1975); Adams vs. Williams, 407 U.S. 143, 146 (1972).

Therefore, it is clear that the "reasonable under the circumstances" test, as used by the Court of Appeals, ignores this

Court's dictates as set forth in Place and Terry. Both the seizure and subsequent search of the luggage at LaGuardia Airport were therefore illegal where the agent possessed neither a warrant or probable cause and exigent circumstances to justify his actions, all in violation of the Petitioner's Fourth Amendment rights.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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BY: _____

A P P E N D I X

[OPINION OF THE UNITED STATES COURT

OF APPEALS

FOR THE ELEVENTH CIRCUIT]

Entered on January 3, 1984

Case No. 83-5428

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

This is an appeal by Jose Antonio Ruiz from a judgment and sentence imposed in a criminal case in the United States District Court for the Southern District of Florida after a non-jury trial and pursuant to a verdict of guilty. Ruiz was convicted of knowingly possessing a firearm which had been converted to fire fully automatic and which was not registered to him with the National Firearms Registration and Transfer Record, in violation of 26 U.S.C.A. §§ 5861(d) and 5871; of knowingly delivering to a common carrier, Eastern Airlines, for transportation and shipment interstate a firearm without having given

written notice to said carrier, in violation of 18 U.S.C.A. §§ 922(e) and 924(a) and 18 U.S.C.A. § 2; and of knowingly and intentionally possessing approximately 73 grams of cocaine in violation of 21 U.S.CA.A. § 844.

On January 26, 1982, appellant Ruiz approached the X-ray machine at the Fort Lauderdale-Hollywood International Airport as he was proceeding toward Eastern's flight number 756 to LaGuardia. When Ruiz's carry-on luggage passed through the machine, the security guard noticed an object which appeared to be a gun and summoned the sheriff. The sheriff asked Ruiz to describe what was in the bag and Ruiz replied that it appeared to be a gun. At the sheriff's direction, Ruiz removed the object which was a firearm with two extra clips and thirty-seven rounds of ammunition. Ruiz disclaimed knowledge and ownership of the gun in his carry-on luggage. However, he was booked on a felony charge of carrying a concealed weapon. Ruiz refused to open the bag

or provide the combination for the bag, and one of the officers tore open the bag. Inside he found the gun as well as identification in four different names. The trial court ruled that this was not a valid inventory search and evidence of the false identification was excluded. The officers retained the tickets for the flight that they had confiscated from Ruiz, one of which had a baggage claim stapled to it. Believing there might be a weapon or explosive device in the checked baggage, the officer directed that the officials at Eastern Airlines at LaGuardia be contacted. When the bag arrived at LaGuardia it was intercepted and put through the X-ray machine. When the bag was X-rayed it was observed to contain a barrel approximately twenty inches long and three to four inches in diameter with perforations in the barrel, a receiver at one end and rolls of tape at the other. The bag was shipped back to Fort Lauderdale. Based upon the information, Narcotics Agent Brennan executed an affidavit

in support of a search warrant for the luggage that Ruiz had checked through to LaGuardia on Eastern flight 756. Upon execution of the warrant, officers found a KG-9 millimeter firearm converted to fire fully automatic, and approximately 73 grams of cocaine.

In determining whether the district Court properly denied appellant's motion to suppress physical evidence, this court must determine whether the trial court committed clear error in applying the law relating to search and seizure. We conclude that the district court properly denied appellant's motion to suppress evidence seized from his suitcase because the submissions of the suitcase to an X-ray scan at LaGuardia Airport and again at Ft. Lauderdale were proper. These actions were reasonable under all of the circumstances presented in this case, and under the holdings of Terry vs. Ohio, 392 U.S.. 1 (1968), and United States vs. Pace, __ U.S. __ (1983). The appellant was not deprived of any

rights he had under the Fourth Amendment to the Constitution. Accordingly, appellant's convictions are AFFIRMED.

[ORDER OF THE UNITED STATES

COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT]

Entered on February 13, 1984

Case No. 83-5428

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

* * *

* * *

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

[JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on January 3, 1984 in

Case No. 83-5428

Before HILL, JOHNSON and HENDERSON, Circuit Judges

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

ISSUED AS MANDATE: February 23, 1984

No. 83-2018

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSE ANTONIO RUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the X-ray examination at an airport of petitioner's checked luggage, because it was reasonably suspected of containing a firearm, constituted an unreasonable search and seizure.

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JOSE ANTONIO RUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on January 3, 1984. A petition for rehearing was denied on February 13, 1984 (Pet. App. A6). The petition for a writ of certiorari was filed on April 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of an unregistered automatic weapon, in violation of 26 U.S.C. 5861(d), 5871 (Count I);

delivery of a container containing a firearm to a common carrier without affording the carrier the necessary notice, in violation of 18 U.S.C. 922(e), 924(a) (Count II); and possession of cocaine, in violation of 21 U.S.C. 844 (Count III) (Pet. App. A1-A2). He was sentenced to a five-year term of imprisonment on Count I, a 10-year term on Count II, and a one-year term on Count III to run concurrently with the sentence imposed on Count II but consecutively to the sentence imposed on Count I. The trial court suspended the sentences imposed on Counts II and III and placed petitioner on five years' probation to commence upon his discharge from incarceration.[1] The court of appeals affirmed (Pet. App. A1-A5).

1. As summarized in the decision of the court of appeals (Pet. App. A1-A4), the evidence at the suppression hearing showed that on January 26, 1982, petitioner and a female companion approached the X-ray machine at the Fort Lauderdale-Hollywood International Airport as they were proceeding to board a flight to New York City's La Guardia Airport. As petitioner's carry-on luggage passed through the X-ray, the security guard observed an object that appeared to be a handgun and summoned an officer of the Broward County Sheriff's Department (Tr. 6-7). When the officer asked petitioner to describe what the object was, he replied that it appeared to be a gun. At the officer's direction, petitioner then removed the weapon along with two magazines and 37 loose rounds of ammunition, explaining that his mother must have placed them in the bag without his knowledge when she was packing it the night before (Tr.

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[1]The district court's sentencing order failed to specify whether the 10-year sentence on Count II was to run consecutively to or concurrently with the five-year sentence imposed on Count I. Presumably, because excecution of the sentence was suspended and the term of probation was not to commence until completion of the sentence on Count I, the sentence on Count II is consecutive and not concurrent.

7-8). After being taken to the airport police office, petitioner stated that the pistol belonged to his brother-in-law. The brother-in-law was contacted, however, and stated that he had sold the weapon to petitioner two years ago (Tr. 9-10, 30). Petitioner was then arrested, charged with a misdemeanor, and released (Tr. 15, 25-29).

While petitioner was being processed by the police, his companion took their airline tickets to attempt to arrange for rebooking on the next flight to New York. However, she was unable to do so because the tickets were in another name. Upon her return, she informed a police officer of this, and the officer confiscated the tickets. Before petitioner departed, the police learned that he had a record of three previous arrests, and they charged him with the felony of carrying a concealed firearm (Tr. 14, 17-18, 23, 30, 36-39). One of the officers then directed petitioner to open his carry-on bag for an inventory of its contents. When petitioner refused, the officer forced the bag open and found that it contained several false identification cards (Tr. 31, 41, 98, 101).

Fearing that there might also be a weapon or explosive device in the baggage that petitioner had checked on the flight, an officer telephoned an employee of Eastern Airlines at La Guardia Airport, told him of the circumstances of petitioner's arrest, and requested that he intercept petitioner's bag and X-ray it as a precautionary measure (Tr. 42-43, 47). Following the arrival of petitioner's flight at La Guardia, the airline employee informed the Fort Lauderdale police that he had secured the luggage, but was unable to open the combination lock. The employee then put the officer on "hold" and placed the bag under an X-ray machine. Thereupon, he observed what appeared to be the barrel and receiver of an automatic weapon (Tr. 48, 56-57, 60-64). Approximately 15 minutes elapsed between the time

the airline employee obtained the bag and when he examined it with the X-ray machine (Tr. 63-64).

In accordance with instructions from the Fort Lauderdale police, the Eastern employee then put the bag on a return flight to Fort Lauderdale. When it arrived the following day, further X-rays confirmed the apparent presence of an automatic weapon inside. Tr. 48-49, 57, 64, 68-69. The officers then obtained a search warrant from a magistrate and searched the bag, which contained an automatic firearm and 73 grams of cocaine (Pet. App. A4).

2. The district court denied the motion to suppress the automatic weapon and the cocaine (Tr. 97-100; Pet. 8).[2] The court held that, although the X-ray was a "search," it was "as inobstrusive [*sic*] as a stop and frisk" and hence could validly be performed on the basis of the reasonable suspicion that existed here (Tr. 99). The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A5). It held that under *United States* v. *Place*, No. 81-1617 (June 20, 1983), and *Terry* v. *Ohio*, 392 U.S. 1 (1968), the "actions [of the police] were reasonable under all of the circumstances presented in this case * * *" (Pet. App. A4).

ARGUMENT

Petitioner contends (Pet. 10-16) that, absent exigent circumstances, the seizure and subsequent X-ray examination of his luggage at La Guardia Airport without first obtaining a warrant violated the Fourth Amendment. This claim was correctly rejected by both courts below and does not warrant further review.

1. It cannot seriously be contended that petitioner's bag was illegally *seized* when the airline employee examined it.

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[2]The court, however, suppressed the documents found in petitioner's carry-on bag following his second arrest on the ground that the search did not constitute a valid inventory search (Tr. 97-98; Pet. App. A3).

Only in the most technical sense can the bag be said to have been seized at all since the airline employee had it in his custody for only about 15 minutes before he discovered that a gun apparently was inside. That is a length of time that any traveler could expect to wait for his checked luggage until it arrived on the baggage carousel; it does not constitute a dispossession of the voluntarily checked luggage. Cf. *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). In any event, petitioner was not at La Guardia Airport waiting for his luggage; he was in lawful custody in Florida. Thus, the examination of the bag at La Guardia did not intrude at all on his "liberty interest in proceeding with his itinerary" (*United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 12) and was not in any practical sense a seizure of his bag.

Even if the X-ray examination is treated as a seizure, it plainly was lawful. In *Place*, the Court held that the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), permit the seizure of luggage on the basis of reasonable, articulable suspicion that the luggage contains contraband or evidence of a crime "for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion." *Place*, slip op. 5. Thus, a government agent is authorized, on the basis of reasonable suspicion alone, "to detain * * * luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope" (*id.* at 10). Petitioner does not dispute that the detention of his checked luggage at La Guardia Airport was based upon reasonable suspicion, nor does he contend that its duration (15 minutes until probable cause was clearly

established) was unreasonable.[3] Hence, there can be no doubt that no unlawful seizure occurred there.

2. a. By the same token, the X-ray examination of the suitcase by the Eastern Airlines employee at the behest of the police did not violate the Fourth Amendment even though probable cause was lacking at the time. An X-ray examination may reveal some limited information about the contents of luggage other than whether it contains contraband, and thus it is properly classified as a "search" within the meaning of the Fourth Amendment. See *United States* v. *Haynie*, 637 F.2d 227, 230 (4th Cir. 1980); *United States* v. *Henry*, 615 F.2d 1223, 1227-1228 (9th Cir. 1980); cf. *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 12-14; *United States* v. *Place*, slip op. 10-11. However, the X-ray examination — whose purpose is solely to protect the safety of airline passengers by detecting guns and explosives (see *Henry*, 615 F.2d at 1228) — is an unusually unobtrusive kind of search. It does not involve opening the bag or physical contact with the contents, and, by design, it reveals far less information about them than an actual opening and search of the bag. As the Ninth Circuit noted in *Henry*, the X-ray scan "reflects an improvement in technology * * * which helps insure that the screening process is no more extensive nor intensive than necessary" to detect guns or explosives to ensure the safety of airport patrons. 615 F.2d at 1228.

Given the very limited privacy intrusion involved in an X-ray examination, one that is designed to obviate the need for the more severe intrusion of opening the luggage, the

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[3]Once the X-ray examination established probable cause to believe that an automatic weapon was present in petitioner's suitcase, it plainly was lawful to continue the detention for a period sufficient to procure a search warrant. See *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 13 (1977).

courts below correctly concluded that the officers acted reasonably in requesting that the checked luggage be subjected to an X-ray based on the articulable suspicion that existed. In *Terry* v. *Ohio, supra,* this Court explicitly recognized that there may be some Fourth Amendment intrusions that are properly characterized as "searches" (see 392 U.S. at 16), but that nonetheless may be lawfully performed on the basis of reasonable suspicion. And this principle plainly is not limited to frisks. See *Michigan* v. *Long,* No. 82-256 (July 6, 1983).[4] The X-ray examination here is very closely analogous to the frisk approved in *Terry.* Both situations involve a very limited invasion of an individual's privacy that is designed only to detect the presence of weapons. As in *Terry,* the X-ray examination here was limited to that necessary to detect a weapon or explosive device that would pose a safety threat and was considerably "less than a 'full' search" (392 U.S. at 26). Indeed, the X-ray examination is considerably less intrusive than the frisk, both because it is less likely to reveal information other than the presence or absence of weapons and because it does not involve the physical contact that the Court in *Terry* noted was a "severe * * * intrusion" and "an annoying, frightening, and perhaps humiliating experience" (*id.* at 24-25; see also *id.* at 16-17). Thus, in view of the limited intrusion involved and the particular security interests that necessitate the prompt discovery of weapons or explosives at an

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[4]The courts of appeals have recognized in a variety of contexts that an activity may be permitted on the basis of reasonable suspicion even if it is characterized as a search within the meaning of the Fourth Amendment. See, *e.g., United States* v. *Allen,* 675 F.2d 1373, 1381 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981) (helicopter surveillance); *United States* v. *Michael,* 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981) (beeper installation and monitoring); *United States* v. *Johnson,* 413 F.2d 1396, 1400 (5th Cir. 1969), aff'd en banc, 431 F.2d 441 (1970) (inspection of automobile vehicle identification number; *United States* v. *Graham,* 391 F.2d 439, 442-443 (6th Cir. 1968) (same); *Cotton* v. *United States,* 371 F.2d 385, 393-394 (9th Cir. 1967) (same).

aircraft facility, the police acted reasonably here in requesting an X-ray inspection of the checked luggage for the purpose of confirming or dispelling the reasonable suspicion that it contained a firearm, and the courts below correctly found that they did not violate the Fourth Amendment.[5]

b. Moreover, petitioner had a considerably reduced expectation of privacy in the contents of his luggage once he checked it with the airline. At that point, he turned over custody and control of the luggage to an entity charged with a paramount duty of ensuring the safety of airline passengers. Indeed, federal regulations specifically require airlines to maintain a screening system to prevent the carriage of any explosive or incendiary device in checked baggage (14 C.F.R. 108.9(a)), under which "passengers may be required to submit their [checked] baggage to inspection." 41 Fed. Reg. 10911 (1976). Thus, petitioner had no expectation that the airline would not expose his checked luggage to an X-ray examination as part of its security program. See Tr. 63 (airline employee here suggested X-raying petitioner's bag "as we would any baggage"). Compare *United States* v. *Gumerlock*, 590 F.2d 794, 799 & n.17 (9th Cir. 1979) (search of air freight package authorized by tariff). Given this extremely limited expectation of privacy, it was

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[5]Petitioner suggests (Pet. 12) that his constitutional rights were violated because the airline official intended to open the suitcase and attempted to do so before he used the X-ray machine. However, this fact is surely irrelevant. First, it is the objective reasonableness of the actual conduct in question that determines whether there is a Fourth Amendment violation, not the motivation of the person involved. See *Scott* v. *United States*, 436 U.S. 128, 136 & n.10 (1978). In any event, the officer here testified that he did not request the airline official to open the bag, only to X-ray it (Tr. 42, 54). In the absence of a district court finding that this testimony was not credible, any attempt by the airline official to open the bag is properly characterized as a private search that does not implicate the Fourth Amendment.

surely reasonable for the police to request the airline to conduct an X-ray screening of petitioner's bag when they acquired an articulable suspicion that it contained a weapon.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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